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No. 90-764

IN THE

Supreme Court of the United States

October Term, 1990

MARK FISCHER,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER PETITIONER'S OBSCENITY CONVICTION RAISES NO REVIEWABLE ISSUES BECAUSE THE OBSCENE VIDEOTAPE FORMING THE BASIS OF THE CONVICTION WAS OFFERED AND ADMITTED INTO EVIDENCE INSTEAD OF "AN ALTOGETHER DIFFERENT VIDEOTAPE" AS PETITIONER ALLEGES.

II. WHETHER THERE IS NO REVIEWABLE CONSTITUTIONAL ISSUE BECAUSE THE TRIAL COURT GAVE THE STATUTORY DEFINITION OF KNOWINGLY AS CONTAINED IN OHIO REVISED CODE, SECTION 2901.22(B) AS PART OF THE JURY INSTRUCTIONS.

III. WHETHER THERE IS NO REVIEWABLE CONSTITUTIONAL ISSUE BECAUSE THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON CONTEMPORARY COMMUNITY STANDARDS IN TERMS OF ACCEPTANCE AND NOT TOLERANCE.

IV. WHETHER PETITIONER'S FOURTH STATED REASON SHOULD NOT BE REVIEWED BECAUSE THE TRIAL COURT DID NOT ERR IN REFUSING PETITIONER'S REQUESTED JURY INSTRUCTION.

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Respondent would urge this Court to deny the Petition for Writ of Certiorari because the questions raised by Petitioner have been addressed and properly resolved with sound analytical reasoning by the Cleveland Municipal Court, the Ohio Court of Appeals, and the Ohio Supreme Court.

STATEMENT OF THE CASE

Petitioner was tried and convicted by a jury of his peers of Pandering Obscenity under Ohio Revised Code Ann. Section 2907.32(A)(5) (Page's 1987) in Cleveland Municipal Court. The trial was conducted June 29, 1988 through July 1, 1988. On August 10, 1988, the trial court sentenced Petitioner to six months in jail, with three months suspended, fined him $1,000.00 and costs, with one year of probation. Transcript of August 10, 1988 Sentencing.

Prior to trial, an evidentiary hearing was conducted on April 12, 1988 pursuant to the Petitioner's motion to suppress. At this hearing, Petitioner was unsuccessful in establishing that the search and seizure of the Detroit Avenue News was conducted in an unreasonable and/or unconstitutional manner. In addition, the Petitioner was unsuccessful in demonstrating that the Cleveland Police engaged in an unconstitutional prior restraint on speech.

At trial Detective King of the Cleveland Police Department testified. It was he who swore out an affidavit attesting that he had purchased video booth tokens from Petitioner who worked there in the adult book store. He testified that he viewed a thirty minute segment of the video tape La Boomba in a video booth, which established probable cause for the issuance of a search warrant authorizing police to search for and seize the La Boomba video. Tr. at 260. That afternoon, Detective King returned to the Detroit Avenue News to determine whether the object of the search warrant was still on the premises. Tr. at 260.

Upon entering the second time, Detective King engaged in a token transaction with Petitioner, who was behind the business counter of the establishment in

control of the merchandise in the store. Tr. at 260-61. This merchandise included the video cassette La Boomba. Detective King engaged in a token transaction with the Petitioner in which he exchanged money for five dollars worth of tokens with the specific purpose of participating in the presentation of all the films in the video arcade area. Tr. at 260-63. Detective King observed Petitioner place the money into the business cash register. With the tokens obtained from Petitioner, Detective King went back to booth 10 and watched a portion of one of the tapes, La Boomba. Detective King returned later and again paid his admission to booth 10 to view the film by depositing tokens, which represent $.25 a token, into the machine. He viewed enough of the film to satisfy him that it was indeed the same film he had viewed earlier that same day. Tr. at 260-62, 275-76, 278. The detective then exited the store and informed other members of his unit that the object of the search warrant was indeed still on the premises. Tr. at 267. Subsequently, the search warrant was executed and the video cassette entitled La Boomba was confiscated.

The prosecution's second witness was Sergeant Roger Dennerll, who testified regarding the execution of the search warrant and the location of the film. Tr. 301-02. The sergeant explained how the video monitor and video recorder system was set up, with cassette recorders and tapes contained in a different area of the store. Tr. at 318-20.

After this testimony, the film, La Boomba, was played to the jury. Tr. at 328-33. Petitioner suggests that because Detective King's affidavit for the search warrant only contained a description of a portion of the video seized that this somehow suggests that the tape was different than the one viewed. However, Detective

King testified that he was satisfied that the portion of videotape he viewed on the second entrance was indeed part of the tape he saw earlier and that was shown to the jury. Tr. at 260-62, 275-76, 278.

It was after the showing of the film that the prosecution rested its case-in-chief. Petitioner's motion for acquittal was denied and Petitioner put on its defense. The defense produced two witnesses, who purportedly offered expert testimony. Tr. at 401-10, 416-585. Dr. Falk was permitted to give an opinion on prurient interest. Tr. at 401-10. Dr. Joseph Scott was permitted to testify regarding the results of a survey conducted by him on the issue of contemporary community standards. Tr. at 462-500. The prosecution objected, however, to Dr. Scott being permitted to give his opinion as to whether the film La Boomba violated the contemporary community standards of the Cleveland community. Tr. at 535-42. The trial court sustained the objection finding that the jury did not need the help of Dr. Scott's opinion to formulate theirs and that such an opinion was clearly a factual determination for the jury. Tr. at 535-42.

Petitioner reasserted his motion for judgment of acquittal at the close of the evidence, which was denied. Tr. at 586. The jury was instructed and returned with a verdict of guilty on that same afternoon, July 5, 1988. Tr. at 671-74, 676.

The Ohio Court of Appeals affirmed Petitioner's conviction. Pet. App. at A2. So did the Ohio Supreme Court. Pet. App. at A1.

Petitioner argues that its petition should be granted for four reasons. First he argues that the prosecution's own evidence established that the videotape offered at

trial was not the same videotape which formed the basis of the charge against Petitioner. This is a curious assertion in light of the evidence of record and the Court of Appeals statement:

> The videotape of "La Boomba" was offered as real evidence to support the charge of pandering obscenity. As such, there must have been a demonstration that the videotape was *the* (emphasis in original) tape viewed by Det. King.

Opinion at 6, Pet. App. at A10.

Secondly, even though the Court of Appeals did not agree with Respondent's proposition that the statutory definition of knowledge contemplates that the culpable mental state of knowledge encompasses situations when a person should have known the nature of the circumstances, it concluded that the error was harmless. Opinion at 18-19, Pet. App. at A32-33. This conclusion was reached because of the myriad of evidence that the store sold predominately sexually oriented material.

> Had the erroneous language of the jury instruction been deleted, there was more than sufficient evidence upon which the jury could conclude that defendant's knowledge had been proven beyond a reasonable doubt.

Opinion at 19-20, Pet. App. at A32-33.

The jury instruction requested by Petitioner on the issue of community standards contravenes the definitions put forth by this Honorable Court. The concept of contemporary community standards has been defined by this United States Supreme Court in terms of acceptance and not tolerance.

Finally, the failure to give Petitioner's requested instruction which mandated a not guilty verdict when the jury is unable to determine contemporary community standards was not error. The issue was covered by other sufficient language and by necessary implication from instructions given on other matters. Furthermore, this failure was not error because the proposed jury instruction was stated in such a manner that it would only confuse the jury, given the fact that it is inherently abstract.

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER'S OBSCENITY CONVICTION RAISES NO REVIEWABLE ISSUES BECAUSE THE OBSCENE VIDEOTAPE FORMING THE BASIS OF THE CONVICTION WAS OFFERED AND ADMITTED INTO EVIDENCE INSTEAD OF "AN ALTOGETHER DIFFERENT VIDEOTAPE" AS PETITIONER ALLEGES.

Petitioner's first reason given to encourage this Court to grant certiorari is not well founded because the facts as reflected in the record do not bear out Petitioner's claim. Petitioner claims that he was convicted based on the admission into evidence of a 76 minute obscene videotape without the prosecution offering into evidence the 30 minute videotape of the same name for which he was arrested. Petitioner further alleges that the tape admitted into evidence is "an altogether different videotape" than the 30 minute one. This reason must fail because the record reflects that the videotape viewed by the jury was not "an altogether different videotape."

Petitioner, an adult book store clerk, was arrested for selling tokens to Detective Gregory King which enabled Detective King to view a thirty minute segment of a videotape entitled "La Boomba." Tr. at 260. Detective King then swore out an affidavit describing the fact that he had purchased tokens from Petitioner to see the videotape and that the tape contained sexual activities, specifically, nudity, sexual excitement, ejaculation, fellatio and cunnilingus between persons regardless of sex. Detective King testified that he viewed the entire 76 minute videotape after the videotape was seized by search warrant. He further testified that after viewing the videotape in its entirety he recognized portions of the

tape to be the same as he had viewed at the adult book store on the day Petitioner sold him the tokens. Tr. at 260-62, 275-76, 278.

There is sufficient evidence in the record to indicate that the videotape portions of "La Boomba" viewed by Detective King with tokens purchased from Petitioner were contained in the longer videotape admitted into evidence at trial. Therefore, the very foundation on which Petitioner rests his argument does not exist. Respondent therefore requests that the petition be denied.

II. THERE IS NO REVIEWABLE CONSTITUTIONAL ISSUE BECAUSE THE TRIAL COURT GAVE THE STATUTORY DEFINITION OF KNOWINGLY AS CONTAINED IN OHIO REVISED CODE, SECTION 2901.22(B) AS PART OF THE JURY INSTRUCTIONS.

The essence of this assignment of error by the Petitioner is that the trial court erred by including in the jury instructions the statement "knew or should have known the nature of the content and character of the performance" when describing the knowledge element of the crime. Petitioner argues that this statement in some way lessened the prosecution's burden of proof by permitting the jury to find that "constructive knowledge or mere negligence was sufficient to meet this essential element of the offense." It is this alleged instructional error, according to the Petitioner, which reduced the prosecution's burden of proof. Petitioner's allegations are unfounded.

The sole aspect of Petitioner's argument that is at least noteworthy is that an instruction that includes "should have known" permits a finding based on constructive knowledge. This is true. However,

Petitioner neglects to mention to this Court that the Trial Court read the statutory definition of knowledge, which includes a provision for constructive knowledge.

Ohio Revised Code Section 2901.22(B) includes the sentence "a person has knowledge of circumstances when he or she is aware that such circumstances probably exist." This is the definition of constructive knowledge, that is included in the complete definition of knowledge in the Ohio Revised Code. Thus, a jury would be permitted to utilize the avenue of constructive knowledge to substantiate a finding that Petitioner had knowledge that the videotape in issue and other materials in the bookstore were obscene.

Detective King's testimony is key as to this essential element. He testified to the name of the establishment being the Detroit Avenue News. He testified to the various types of sex related merchandise available in the store and its sexually explicit character. He also testified regarding the advertisement of "adult movies." Tr. at 248-67. This is clear testimony which bolsters the establishment of the fact that the Petitioner "probably" knew of the nature and character of the material. Pet. App. at A30-A32.

Therefore, Petitioner's second reason should fail.

III. THERE IS NO REVIEWABLE CONSTITUTIONAL ISSUE BECAUSE THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON CONTEMPORARY COMMUNITY STANDARDS IN TERMS OF ACCEPTANCE AND NOT TOLERANCE.

The concept of contemporary community standards has been defined by this United States Supreme Court in terms of acceptance, not tolerance as Petitioner suggests.

In *Smith v. California*, 361 U.S. 147, 155 (1959), this Court addressed this issue. This Court affirmed the conviction and approved of a jury instruction that contemporary community standards were set by what is in fact *accepted* by the community as a whole (emphasis added).

In the case of *F.C.C. v. Pacifica*, 438 U.S. 726, 740 (1978), this Honorable Court again discussed the prurient appeal prong in terms of community acceptance and not tolerance. This Court stated that "prurient appeal is an element of obscene, but the normal definition of 'indecent' merely refers to nonconformance with *accepted standards* of morality" (emphasis added).

In the case of *Sedelbauer v. State*, 428 N.E.2d 206, 210-11 (1981), the Indiana Supreme Court held that *acceptance* rather than tolerance was the concept that governed the application of contemporary community standards (emphasis added). The Court further noted that there was indeed similarity between the terms acceptance and tolerance but held that "the trial court did not err in using the word accept in giving instructions to the jury rather than the word tolerate as requested by the defendant."

Given these clear delineations in the law that the term acceptance may be used as it relates to contemporary community standards, the trial court did not err in its instructions. Therefore Petitioners third reason should fail.

IV. PETITIONER'S FOURTH STATED REASON SHOULD NOT BE REVIEWED BECAUSE THE TRIAL COURT DID NOT ERR IN REFUSING PETITIONER'S REQUESTED JURY INSTRUCTION.

The failure to give Petitioner's requested jury instruction was not error and should not be reviewed. The denied instruction was covered by other sufficient language and by necessary implication from instructions given as to other matters. Further, this failure was not error because the manner in which it is stated would simply confuse the jury as it goes to an abstract proposition.

Petitioner requested that the trial court instruct the jury to find him guilty if they could not determine the community standards with respect to explicit sexual material. Tr. at 666. However, there has never been a claim that has inferred that there was not sufficient evidence in the record to determine community standards. The absence of such a claim even further supports the conclusion that this Court's review is unwarranted.

The statement contained in the jury instruction at issue was no longer required when the trial court instructed the jury that each and every essential element of the crime charged had to be proven beyond a reasonable doubt. This makes the concept a concrete proposition rather than the abstract manner in which the requested instruction states the proposition. Opinion at 20, Pet. App. A34-A36.

Therefore, the fourth reason of Petitioner should fail.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition For A Writ Of Certiorari be denied.

Respectfully submitted,

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